**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**COCA COLA REFRESHMENTS, INC.**

**and** **Case 09-CA-186932**

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT), LOCAL 1199**

## ORDER

The Employer's petition to partially revoke subpoena duces tecum B-1-V84ARL is denied. The subpoena seeks information relevant to the matters under investigation and describes with sufficient particularity the evidence sought, as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations.[1]

Further, the Employer has failed to establish any other legal basis for revoking the subpoena. See generally *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005 (9th Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507 (4th Cir. 1996).

Dated, Washington, D.C., May 8, 2017.

PHILIP A. MISCIMARRA, CHAIRMAN

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

[1] In considering the petition to revoke, we have evaluated the subpoena in light of the Region's clarification in its opposition brief that for subpoena par. 2, it seeks only those documents and records reflective of the Employer's analysis and planning regarding overtime hours, and documents reflecting overtime hours in the sanitation department as well as across the production department, for the time period of January 1, 2016, through December 31, 2016. Contrary to our dissenting colleague's assumption, the Region's clarification of this subpoena paragraph does not establish that it was initially overbroad or irrelevant, and we find that it was not.

Rather, the Region's modifications of par. 2 appear simply to promote efficiency and provide further clarity to the parties.

We have also evaluated the subpoena in light of the Region's statement in its opposition brief that for subpoena par. 3, it is limiting its request to the time period of January 1, 2016, through December 31, 2016. The Region acknowledges that a literal reading of par. 3 does not limit the temporal scope of the request, and we view its limitation of the time period for this request as sufficient to address the Employer's concerns in this regard.

To the extent that the Employer asserts that it may not be able search the relevant managers' emails because it has sold the assets of its operations, transitioned the operation of the facility to a different entity, and terminated the managers at issue here without preserving their emails, we note that the Employer is not required to produce evidence that it does not possess, but the Employer is required to conduct a reasonable and diligent search for all requested evidence, and as to requested evidence that the Employer determines that it does not possess, the Employer must affirmatively represent to the Region that no responsive evidence exists.

Chairman Miscimarra respectfully dissents from the Board majority's denial of the petition to revoke as to subpoena par. 2 because he finds the request for "any documents . . . regarding overtime hours prepared in advance of the Employer's decision to reduce overtime costs within the Production Department in 2016" to be overbroad, since it would require production of any document related to overtime even if made years before the decision to reduce overtime costs and even if wholly unrelated to that decision. The Board majority finds that the request is not overbroad, because it considers the request in light of the Region's clarification in its opposition brief. In such circumstances, when subpoena requests are overly broad or otherwise seek information that does not reasonably relate to matters under investigation, and when a subpoenaed party's petition to revoke raises appropriate objections to the requests on that basis, Chairman Miscimarra believes it is more appropriate for the Board to *grant* the petition to revoke as to such requests, rather than denying the petition to revoke (as the Board majority does here) based on changes that are communicated only in briefs submitted after the petition to revoke is under consideration by the Board. See Sec. 11(1) (stating the Board "shall revoke" any subpoena where "the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required"). Regarding the majority's statement that the Region's modification served merely "to promote efficiency and provide further clarity to the parties," he believes efforts to ensure that a subpoena is appropriate in scope must be undertaken by the Region in the first instance when crafting the subpoena, rather than through post-petition to revoke clarifications. Chairman Miscimarra believes that granting a petition to revoke in these circumstances would be without prejudice to the potential issuance a new subpoena that is appropriate in scope (subject to applicable time limits and other requirements set forth in the Act and the Board's Rules and Regulations).

Finally, without consideration of the Region's post-petition clarification, Chairman Miscimarra finds that par. 3 is not overbroad in temporal scope since it seeks documents related to a specific decision, and it is therefore inherently limited in temporal scope from when the Employer began contemplation of that decision to the present.